Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

GARY R. LEBLANC,

Petitioner,

v.

RICHARD P. SALEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Pro Se Petitioner

April 19, 2000

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

39pp

QUESTION PRESENTED

1. Whether U.S. Bankruptcy Court's, Queenan, J., allowance of Trustee's motions to compromise settlement and abandon claim, provided Trustee with complete judicial immunity from suit by creditor of estate for negligence and breach of fiduciary duty, in failing to investigate creditors prior allegations of fraud and failure to account for the "facts of the sale", as previously ordered by the Court.

PARTIES

The parties to the proceedings below were the petioner, Gary R. LeBlanc, acting pro se, and the respondent Richard P. Salem, by his counsel of record, Jon C. Cowen, POSTERNAK, BLANKSTEIN & LUND, LLP.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Gary R. LeBlanc, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on November 22, 1999.

OPINIONS BELOW

The opinion of the Court of the Appeals for the First Circuit is published at 196 F.2d. 1 (1st Cir. 1999) and reprinted in the Appendix hereto ("App. A") at page App. 1a. By order entered November 22, 1999, The First Circuit denied LeBlanc's petition for rehearing. A copy of the order denying rehearing is reprinted in the Appendix at page App. 20a. The Memorandum decision of the United States District Court for the District of Massachusetts, dismissing the appeal is reprinted in the Appendix hereto at page App. 21a.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1334, and 28 U.S.C. § 158(d), the petitioner brought this suit in the United States District Court for the District of Massachusetts. On June 25, 1999, after remand, the United States District Court entered judgment granting summary judgment to the respondent.

On November 2, 1999, the United States Court of Appeals for the First Circuit affirmed the decision of the United States District Court entering judgment in favor of the respondent.

On November 22, 1999, the United States Court of Appeals for the First Circuit denied Petitioner's Petition for Panel Rehearing.

STATEMENT OF CASE

Pursuant to 11 U.S.C. § 704(1)(2), which requires a trustee in bankruptcy to "collect and preserve the assets of the estate", Trustee/Appellee Salem had a fiduciary duty in the Fall of 1995 to collect and preserve a contingent settlement which had been approved as a bankruptcy court asset, in the Estate of Mailman Steam Carpet Cleaning, Corp. (U.S. Bankruptcy Court, No. 93-40746-JFQ).

Said Bankruptcy Court Order was a contingent settlement which required the Trustee Salem to review the "facts of the sale" of commercial property, attached by a judgment awarded to the Mailman Estate, and after review, the trustee "[may move for revocation of the settlement".

Prior to and more specifically, upon the sale of the subject property in June of 1996, Appellant/Creditor LeBlanc pleaded and demanded that Trustee Salem review the "facts of the sale" and provide a complete accounting of the sale assets as required by the court order and trustee's

fiduciary duty. LeBlanc alleged that the subject real estate was fraudulent.

It is undisputed that despite LeBlanc's allegations of fraud, Trustee Salem failed and/or refused to provide an accounting or even investigate the sale. Creditor LeBlanc further demanded that Trustee Salem move to escrow the funds upon the sale of the subject property, pending a review of the "facts of the sale" in light of LeBlanc's substantial allegations of fraud. Again, it is undisputed that Trustee Salem failed and/or refused to do so. Within weeks of the sale of the subject property, the proceeds of the sale were distributed.

In March, 1998, over two (2) years subsequent to the sale of the subject property, Trustee Salem moved the Court to abandon the contingent claim and accept a reduced compromise settlement. The Court, without a full hearing into the "facts of the sale" or creditor's allegations of fraud, relied on Trustee, in his fiduciary capacity and allowed Trustee's motions, compromised the settlement and abandoned the claim.

Creditor LeBlanc brought an action against Trustee for willful and deliberate breach of his fiduciary duty, as well as, negligence in the performance of his fiduciary duty in violation of the bankruptcy court order. Said complaint was subsequently dismissed by the court on its own motion for summary judgment. The subsequent appeals to the U.S. District Court and U.S. Court of Appeals for the First Circuit, upheld the summary judgment on the theory that the Bankruptcy

Court's approval of the Trustee's motion to abandon claim and compromise settlement exonerated the trustee from all liability. (Attached hereto).

ARGUMENT

Pursuant to 11 U.S.C. § 704, the actions or inactions of the Trustee in bankruptcy may be challenged and examined for breach of fiduciary duty, which directly or proximately causes injury and damage to the estate and its creditors, the trustee is sworn to protect. The basis for imposing liability on a trustee who improperly administers a bankruptcy estate is found in the trustee's status as fiduciary. "A bankruptcy trustee is a fiduciary of the estate's creditors, and his duty to collect and conserve the assets of the estate . . . is a fiduciary obligation". *In re Melenyzer*, 140 B.R. 143 (Bkrtcy.W.D.Tex.1992).

The Court's abandonment of the claim and compromise settlement over two years after the sale of the subject property cannot negate the alleged negligence of the trustee in the performance of his fiduciary duties, two years earlier. See, *In re Estate of Graven*, 64 F.2d. 453, 454 (8th Cir.1995) (after a creditor made allegations of fraud, the bankruptcy court ordered the trustee to investigate the transfers and to file a report). Trustee Salem's failure in 1996 to investigate Creditor LeBlanc's allegations of real estate fraud in light of the court's order to review "the facts of the sale", and further failure to provide even a basic accounting of the assets allegedly sold was willful intentional negligence. "This duty to pre-

serve assets would also include any assets that are known or have been brought to the trustee's attention as misappropriated. The failure of a trustee to not affirmatively act upon learning of such misappropriation is negligence". *In re Chicago Art Glass, Inc.*, 155 B.R. 180, 188 (Bkrtcy.N.D.Ill.1993).

The First Circuit Court of Appeals decision fails to consider *In re Chicago Art Glass*, 155 B.R. 180 (Bkrtcy.N.D.Ill. 1993), and its prodigy. In the case of *In re Chicago Art Glass, Inc., supra*, the Court held in relevant part, "A trustee has a duty to preserve estate assets, *In re Reich*, 54 B.R. 995 (Bkrtcy.E.D.Mich.1985); this duty to preserve assets would also include any assets that are known or have been brought to the trustee's attention . . . the failure of a trustee to not affirmatively act upon learning of such . . . is negligence, [and] is a breach of his or her fiduciary duty to the estate". *Id.* at 188.

The First Circuit Court of Appeals ruled that because Trustee Salem obtained approval of the Court to compromise settlement and abandon claim that "Salem is thus entitled to immunity unless there is reason to believe that he acted in bad faith . . ." (See App., 17a-18a). The Court further states that "the record reveals nothing of this sort, no one questioned Salem's good faith . . . and there is no basis for a suggestion that he was anything but forthcoming to the Court and its creditors". *Id.*

This statement could not be further from the truth or the facts of this case. Although it is

true that Creditor LeBlanc stopped short of accusing Trustee Salem of being a knowing participant in the fraud, it was only because LeBlanc feared further reprisals by the trustee in the form of further inaction, when LeBlanc sued the trustee after he motioned the Court to abandon the claim, LeBlanc alleged willful and deliberate negligence conduct on the part of the trustee. Therefore, the Complaint itself is a resounding allegation of bad faith by Trustee Salem.

Further, it is not what the record states but rather what the record fails to state, which clearly shows the trustee never provided the creditors or the court with even a basic accounting of the assets of the sale compromising $560,000.00. Trustee Salem was anything but forthcoming, regarding the assets that compromised the sale, and the lack of accounting of one single asset sold, other than the real estate itself, which justified reducing the judgment by approximately $350,000.00.

The First Circuit's decision further states, in relevant part, "The substance of the transaction in dispute, and the record on appeal is devoid of any satisfactory evidence of its terms . . .", *supra.* "Judicial immunity is contingent upon candid disclosure to the Court and its creditors of the relevant circumstances surrounding the proposed action". *Mosser* v. *Darrow*, 341 U.S. 267 (1951). Since the Court conducted little hearing into the "facts of the sale" and specifically no accounting of the assets of the sale, both the creditors and the Estate of Mailman were deprived of due process of law.

A full and fair hearing on the abandonment of the claim would have required a complete accounting of the sale by the trustee. These "*facts*" were never produced before the court. To this day, neither creditor LeBlanc nor the Court has ever been provided with an accounting of the sale. The inaction of the Trustee to provide an accounting of even the basic "facts of the sale" may have deprived the estate and its creditors of sever hundred thousands of dollars. However, appellant/creditor LeBlanc argues the conditional settlement approval ordered the trustee to review the "facts of the sale". Those facts would have to be on the record in full and compete candor before the court for the trustee to don protection under the robe of judicial immunity. In this case, there was no such candor and/or disclosure.

28 U.S.C. § 959(a) provides in relevant part, "Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the Court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property." Appellant's complaint should not have been disposed by summary judgment. It should not even have been ruled on by the same judge who abandoned the claim, appointed the trustee and whose own actions in the case were under appeal for abuse of discretion.

The First Circuit Court of Appeals' fatal error is that it assumes full and complete candor and disclosure to the Bankruptcy Court by the trustee of his actions in order to gain the immu-

nity of the court by simply filing the motion to abandon claim. This logic would provide immunity to the most inept and negligent trustees.

Appellant argues that as *In re San Juan Hotel*, 847 F.2d 931 (1st Cir.1988), the trustee is only provided immunity if all the facts are before the court and there has been full and complete candor and disclosure by the trustee before the court. In the case at hand, nothing could be further from the truth. Creditor LeBlanc alleges the opposite; complete and total disregard and breach of fiduciary duty; total failure to obey the court's own order and total lack of even basic accounting principles in evaluating an alleged real estate sale, subject to the bankruptcy estate, in violation of his fiduciary duties as delineated in 28 U.S.C. § 704.

CONCLUSION

Trustees and other fiduciaries are held liable for their actions or inactions every day in our courts. All of us who are placed in a position of trust must be subject to review if we are not In compliance with the duties of our trust.

The total lack of record In this case verifies LeBlanc's allegations that Trustee Salem took no action to investigate Creditor LeBlanc's allegations of fraud in the sale of the subject property. "Like Pilate, the trustee washed his hands of the dispute". See, *In re Chicago Art Glass, Inc., supra* at 188. "Judicial immunity is contingent upon candid disclosure to the court and the creditors of

the relevant circumstances surrounding the proposed action". See, *Mosser* v. *Darrow, supra* at 274. "Only after such disclosure has been made, and the Court is aware of the pertinent facts, does judicial approval become meaningful". See, *In re San Juan Hotel, Corp.*, 847 F.2d. 931, 942 (1st Cir. 1988).

WHEREFORE, based upon the foregoing, the Petitioner, Gary R. LeBlanc, respectfully moves this Honorable Court to allow his Writ of Certiorari and reverse the decision of the U.S. Court of Appeals for the First Circuit and rule accordingly.

Respectfully submitted,
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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 99-1170

IN RE MAILMAN STEAM CARPET
CLEANING CORP.,
Debtor.

GARY R. LEBLANC,
Appellant,
v.
RICHARD P. SALEM, TRUSTEE, ETC.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
MASSACHUSETTS
[Hon. Edward F. Harrington, U.S. District Judge]

Before
Selya, Circuit Judge,
Bownes, Senior Circuit Judge,
and Lipez, Circuit Judge.

Gary L. LeBlanc, pro se ipso, for appellant.
Jon C. Cowen, with whom George A. Berman and Posternak, Blankstein & Lund, L.L.P. were on brief, for appellee.

November 2, 1999

SELYA, Circuit Judge. Acting in his capacity as a bankruptcy trustee, Richard P. Salem sought and received court approval to abandon certain property of the bankruptcy estate. A disgruntled creditor, Attorney Gary R. LeBlanc, filed an adversary proceeding against Salem, alleging negligence and breach of fiduciary duty. The bankruptcy court converted Salem's ensuing motion to dismiss into a motion for summary judgment and granted it on the ground that Salem could not be held personally liable because he had acted pursuant to a court order. On appeal, the district court endorsed this ruling. LeBlanc presses forward. We reject Salem's suggestion that the lower courts lacked jurisdiction to entertain LeBlanc's quest, but we agree that Salem's actions are entitled to protection under the doctrine of derived judicial immunity. Consequently, we affirm.

I. BACKGROUND

Following conventional practice, we assay the facts in the light most favorable to the party opposing brevis disposition (here, LeBlanc) and draw all reasonable inferences in his favor. See Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 762-63 (1st Cir. 1994) (holding that Fed. R. Bankr. P. 7056, which makes Fed. R. Civ. P. 56 applicable to bankruptcy proceedings, requires the application of traditional summary judgment principles in bankruptcy proceedings). We do not give credence to empty rhetoric, however, but credit only those assertions that are supported by materials of evidentiary quality. See Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5,

8 (1st Cir. 1990) (warning that a party opposing summary judgment cannot rely on "conclusory allegations, improbable inferences, and unsupported speculation"). Here, the record on appeal lacks crucial documents, so in many instances we simply present the parties' contradictory positions. For the same reason, we use round numbers throughout, conscious that they are approximations.

In October 1990, Mailman Steam Carpet Cleaning Corp. (Mailman), represented by LeBlanc, won a judgment in excess of $450,000 against Alfred C. Lizotte and, to secure it, attached a parcel of commercial real estate owned by Lizotte. At the time, a corporation controlled by Lizotte (the Corporation) operated a service station on the premises as a franchisee of Gulf Oil, Inc. (Gulf). LeBlanc had represented Mailman on a contingent fee basis in the original litigation, and both the judgment and the fee remained uncollected when, on March 15, 1993, Mailman filed a voluntary bankruptcy petition under Chapter 7, 11 U.S.C. §§ 701-766 (1994). Salem was appointed trustee and he embarked upon the administration of the estate.

On September 18, 1995, Salem filed a notice of intention to settle the claim against Lizotte for $100,000 and sought court approval of the plan. LeBlanc, qua creditor, filed an objection in his own right. The court held a hearing on October 19, during which Salem introduced an appraisal that estimated the fair market value of the real estate, including the fixtures and equipment associated with the Corporation's business, at

$390,000. In an apparent effort to segregate the value of the property attached, the appraiser carved out $175,000 of this total and assigned it to the "[l]and, buildings and installations" owned personally by Lizotte. Even this reduced amount was not free and clear, for the real estate was encumbered by a prior first mortgage that secured $100,000 in debt.

These figures proved controversial. LeBlanc maintained that the real estate was worth much more (say, $500,000), but he offered no concrete evidentiary support for this claim. No other creditor objected to the proposed settlement, and the bankruptcy court eventually approved it, subject to the following proviso:

> If the gas station is sold within two years from [Oct. 19, 1995], the trustee may move for revocation of this approval. Depending on the facts of the sale, the court will then either confirm or revoke its approval.

The court denied LeBlanc's subsequent motion to alter or amend and ordered Salem to deliver an executed discharge of the lien, to be held in escrow pending payment of $100,000 to the estate.

In May 1996 (roughly seven months after the court's conditional approval of the settlement), Lizotte and the Corporation sold the property for some $560,000. The substance of the transaction is in dispute, and the record on appeal is devoid of any satisfactory evidence of its terms. We do know, however, that $100,000 went to the bankruptcy estate to complete the settlement and that a like amount went to the first mortgagee to discharge the prior lien. Salem as-

serts that the balance represented business assets of the Corporation and was paid out accordingly. LeBlanc contends that this allocation was a sham and that Lizotte fraudulently diverted $360,000 that should have been available to his creditors (including Mailman and, derivatively, LeBlanc himself).

Shortly after the sale, LeBlanc moved to revoke the approval order and to compel Salem to seek its revocation. While these motions were pending, the bankruptcy court granted LeBlanc permission under Fed. R. Bankr. P. 2004 to examine Lizotte, Gulf, and the Corporation, limited, however, to information concerning the terms of the sale and to whom the proceeds went. The court later rebuffed LeBlanc's attempt to examine the buyer, Peterborough Oil Co. The permitted discovery was not completed until the winter of 1997-1998.

In March 1998, Salem notified Mailman's creditors that he intended to abandon the reserved right to seek revocation of the Lizotte settlement. LeBlanc - and LeBlanc alone - opposed abandonment. At a hearing held on April 15, 1998, LeBlanc again accused Lizotte of chicanery and described the results of his investigation. He made three main points: (1) at the Rule 2004 examination, Lizotte could recall no specific business assets that were exchanged for the $560,000 purchase price; (2) neither the purchase-and-sale agreement nor the recorded deed mentioned any assets other than the improved real estate; and (3) the deed listed the sale price of the real estate at $300,000. LeBlanc failed to persuade, and the

bankruptcy court overruled his objection and authorized Salem to abandon the right to seek revocation.[1]

That same day, LeBlanc filed an adversary proceeding against Salem, alleging negligence and breach of fiduciary duty stemming from Salem's failure to seek revocation of the settlement. Salem moved to dismiss the complaint on the ground that it failed to state an actionable claim. The bankruptcy court treated the motion as one for summary judgment and granted it on the ground that the complaint constituted an unfair attempt to hold Salem personally liable for taking an action that the court had sanctioned. The district court upheld the ruling and this appeal followed.

II. THE JURISDICTIONAL ISSUE

Salem questions the bankruptcy court's subject matter jurisdiction over this adversary proceeding. Because it would be inappropriate for this court to address the merits in the absence of a genuine case or controversy, see Steel Co. v. Citizens For a Better Env't, 523 U.S. 83, 93-94 (1998), we cannot ignore this challenge.

LeBlanc's complaint premises his right to sue on 28 U.S.C. § 959(a), which provides in relevant part:

> Trustees, receivers or managers of any property, including debtors in possession,

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[1] LeBlanc appealed this order. As of the date of oral argument on this collateral matter, his direct appeal was still pending in the district court.

> may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.

Salem correctly observes that the abandonment at issue here did not arise in the course of "carrying on business" by the trustee and thus suggests that LeBlanc's failure to obtain leave from the bankruptcy court before instituting his adversary proceeding renders that proceeding a nullity. This approach relies on two faulty premises, namely, (1) that section 959(a) is the exclusive source of jurisdiction for such a proceeding, and (2) that, in all events, LeBlanc's misplaced reliance on section 959(a) forecloses consideration of any other jurisdictional source.

A

The first premise rests on the view that by allowing a certain category of suits to proceed without prior leave from the appointing court, section 959(a) negatively implies that leave is required in all other cases. But this view throws out the baby with the bath water. Over a century ago, the Supreme Court as a matter of federal common law barred suits against receivers in courts other than the court charged with administration of the estate, explaining that leaving litigants free to sue receivers in other courts would effectively "take the property of the trust from [the receiver's] hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property." Barton v. Barbour, 104 U.S. 126, 129 (1881); see also Vass

v. Conron Bros. Co., 59 F.2d 969, 970 (2d Cir. 1932) (L. Hand, J.) (holding Barton applicable to bankruptcy trustees). Congress responded by passing the predecessor of the present section 959(a) to suspend the approval requirement for suits arising in the course of carrying out business connected with trust property. Subject to this exception, a long line of cases has required leave from the bankruptcy court before allowing an action against the trustee to proceed in another tribunal. See, e.g., In re Linton, 136 F.3d 544, 545 (7th Cir. 1998) (collecting cases); cf. Unsecured Creditors Comm. of Debtor STN Enters. v. Noyes (In re STN Enters.), 779 F.2d 901, 904 (2d Cir. 1985) (requiring bankruptcy court approval for creditors to pursue an adversary proceeding against a third party).

Neither these precedents nor the rationale that undergirds them have any application to proceedings in the court that is overseeing administration of the bankruptcy estate. Congress enacted section 959(a) to carve out an exception to the Barton rule, not to expand the leave requirement to a new category of cases. See McNulta v. Lochridge, 141 U.S. 327, 330 (1891) ("The act does not deprive any one of the right to sue where such right previously existed, but gives such right in certain cases . . . ."). We hold, therefore, that any negative implication which can be extracted from the language of section 959(a) runs only to cases brought in courts other than the bankruptcy court. Accord Estate of Reich v. Burke (In re Reich), 54 B.R. 995, 997-98 (Bankr. E.D. Mich. 1985) (holding that prior approval by the bankruptcy court is not a prerequisite for fil-

ing a creditor action against the trustee in that court).

Of course, sidestepping this obstacle does not necessarily leave a clear path for LeBlanc. As the proponent of the suit, he still bears the onus of establishing subject matter jurisdiction. See Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998). Here, however, jurisdiction exists. Bankruptcy trustees have the capacity to sue and be sued, see 11 U.S.C. § 323(b); federal district courts have original jurisdiction over all civil proceedings related to bankruptcy cases, see 28 U.S.C. § 1334(b); and the Massachusetts federal district court, acting pursuant to 28 U.S.C. § 157(a), has delegated such matters to bankruptcy courts, see D. Mass. R. 201. Because LeBlanc's claim obviously relates to the underlying bankruptcy case - he says that Salem breached his duty under 11 U.S.C. § 704 - the question becomes whether LeBlanc is a proper party to pursue the cause of action. We think that he is.

The Bankruptcy Code provides that "[a] party in interest, including . . . a creditor . . ., may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b). Chapter 7 includes no comparable provision, but in practice bankruptcy courts routinely entertain adversary proceedings against Chapter 7 trustees. See, e.g., Yadkin Valley Bank & Trust Co. v. McGee, 819 F.2d 74 (4th Cir. 1987); Kowalski-Schmidt v. Forsch (In re Giordano), 212 B.R. 617 (B.A.P. 9th Cir. 1997); United States ex rel. George Schumann Tire & Battery Co. v. Grant (In re George Schumann Tire

& Battery Co.), 145 B.R. 104 (Bankr. M.D. Fla. 1992); White County Bank v. Leavell (In re Leavell), 141 B.R. 393 (Bankr. S.D. Ill. 1992). In light of the structure and purposes of the Bankruptcy Code, we agree with these courts that the right to be heard applies in the liquidation context.

B

This brings us to the second premise of the jurisdictional challenge: the idea that, since LeBlanc's complaint incorrectly predicates jurisdiction on section 959(a), his adversary proceeding must be dismissed. This is pettifoggery, pure and simple, and we need not linger over it.

Affirmative pleading of the precise statutory basis for federal subject matter jurisdiction is not required as long as a complaint alleges sufficient facts to establish jurisdiction. See Brock v. Superior Care, Inc., 840 F.2d 1054, 1063-64 (2d Cir. 1988); Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1212 (9th Cir. 1980); 2 James Wm. Moore et al., Moore's Federal Practice § 8.03[3] (3d ed. 1999). In this vein, we have recognized that federal subject matter jurisdiction may be established by reading a complaint holistically, "even though the jurisdiction expressly asserted was improper." Massachusetts v. United States Veterans Admin., 541 F.2d 119, 122 (1st Cir. 1976); cf. Viqueira, 140 F.3d at 18-19 (considering and rejecting on the merits a possible source of jurisdiction not explicitly referenced in the complaint). These general principles apply in the bankruptcy context. See Fed. R. Bankr. P. 7008 (incorporating Fed. R. Civ. P. 8).

Here, LeBlanc's complaint identified his creditor status and charged that Salem breached his fiduciary duty as a Chapter 7 trustee. These averments, coupled with the statutory provisions alluded to above, satisfy us that LeBlanc's complaint, on its face, alleged sufficient facts to support jurisdiction, notwithstanding its mistaken reference to section 959(a). See J. Baranello & Sons v. Baharestani (In re J. Baranello & Sons), 149 B.R. 19, 27 (Bankr. E.D.N.Y. 1992).

III. THE MERITS

We next consider the bankruptcy court's dismissal of the adversary proceeding. We again divide our discussion into two segments.

A

As mentioned above, the bankruptcy court converted Salem's motion to dismiss for failure to state a claim into a motion for summary judgment. Applicable procedural rules authorize such a step under certain circumstances, see Fed. R. Bankr. P. 7012(b) (making applicable Fed. R. Civ. P. 12(b)), and LeBlanc does not contest the use of the device here. We mention conversion, however, because the bankruptcy court, by not acting on the motion to dismiss simpliciter, impliedly held that LeBlanc's complaint - which omitted any reference to court approval of the abandonment - stated a valid cause of action.[2] We examine this premise.

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[2] Insofar as we can tell, the principal impetus for conversion was the bankruptcy court's desire to take judicial notice of its own prior order. We question whether con-

The Bankruptcy Code provides that a Chapter 7 trustee shall, inter alia, "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(1). LeBlanc's complaint alleges in substance that Salem negligently failed to conduct an adequate investigation and acquiesced in a settlement incompatible with the best interests of creditors, thereby violating his fiduciary duty. So stated, the claim derives solely from the trustee's statutorily-inspired duty of care. See infra note 4. Hence, its validity depends, in the first instance, on whether an action for negligence lies against a bankruptcy trustee in his individual capacity.[3]

The exact parameters of a trustee's fiduciary duties and the potential penalties for breach thereof are not fixed by the Bankruptcy Code, and

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version was necessary to accomplish that end. See Fed. R. Evid. 201; Fed. R. Bankr. P. 9017 (making applicable Fed. R. Evid. 201); see also Cinel v. Connick, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994) (holding that, "[i]n deciding a 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record"); United States v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991) (similar); cf. Bryant v. Avado Brands, Inc., 187 F.3d 1271 (11th Cir. 1999) (taking judicial notice of SEC filings in deciding a Rule 12(b)(6) motion to dismiss).

[3] We note that LeBlanc's pleading at one point describes Salem's inaction as "willful and deliberate." Viewed in context, this reference seems to denote at most gross negligence. In all events, there is no suggestion that Salem was in cahoots with Lizotte, profited in any way as a result of Lizotte's alleged fraud, or even knew of it. Thus, no matter how this conclusory allegation may be construed, it does not affect our analysis. See Medina-Munoz, 896 F.2d at 8.

the case law is somewhat murky at the edges. It is settled, however, that a bankruptcy trustee may be held personally liable for breach of the duty of loyalty. See Mosser v. Darrow, 341 U.S. 267, 271, 274 (1951). The Mosser Court surcharged a bankruptcy trustee for expressly permitting two employees to profit by selling securities to the estate, declaring in unqualified terms that "[e]quity tolerates in bankruptcy trustees no interest adverse to the trust." Id. at 271.

Following Mosser, the courts of appeals have split almost evenly on the question of whether a bankruptcy trustee can be held personally liable for negligence (as opposed to deliberate misconduct). Compare In re Gorski, 766 F.2d 723, 727 (2d Cir. 1985) (responding in the affirmative), Red Carpet Corp. v. Miller, 708 F.2d 1576, 1578 (11th Cir. 1983) (per curiam) (same), and Hall v. Perry (In re Cochise College Park, Inc.), 703 F.2d 1339, 1357 (9th Cir. 1983) (same), with Yadkin Valley, 819 F.2d at 76 (responding in the negative), In re Chicago Pac. Corp., 773 F.2d 909, 915 (7th Cir. 1985) (dictum) (same), Ford Motor Credit Co. v. Weaver, 680 F.2d 451, 461-62 (6th Cir. 1982) (same), and Sherr v. Winkler, 552 F.2d 1367, 1375 (10th Cir. 1977) (same).[4] We

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[4] Courts sometimes have blurred the important distinction between two types of actions against trustees: breach of fiduciary duty claims brought by parties interested in the administration of the estate, and claims in tort or contract brought by third parties. See, e.g., Sherr, 552 F.2d at 1375 (misapplying fiduciary principles to a tort action by a third party). Although a bankruptcy trustee enjoys an immunity vis-à-vis third parties for actions within the scope of his official duties, see Ziegler v. Pitney, 139 F.2d 595, 596 (2d Cir. 1943); see also McNulta, 141 U.S. at 332

heretofore have left the question open. See Lopez-Stubbe v. Rodriguez-Estrada (In re San Juan Hotel Corp.), 847 F.2d 931, 937 & n.5 (1st Cir. 1988); Connecticut Gen. Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 621 (1st Cir. 1988).

In our view, Mosser, properly construed, strongly indicates that parties interested in the administration of a bankruptcy estate can seek to surcharge the trustee for negligence. While Mosser itself involved "a willful and deliberate setting up of an interest in employees adverse to that of the trust," the Court took pains to clarify that "[t]he liability here is not created by a failure to detect defalcations, in which case negligence might be required to surcharge the trustee . . . ." 341 U.S. at 272. The unmistakable implication of this observation is that, in the absence of deliberate misconduct, negligence suffices for surcharge. Indeed, even the courts of appeals that decline to impose personal liability for negligence draw this inference. See, e.g., Sherr, 552 F.2d at 1375 ("A trustee in bankruptcy may be held liable in his official capacity and thus surcharged if he fails to exercise that degree of care required of an ordinarily prudent person serving in such capacity, taking into consideration the discretion allowed."). These courts, however, differentiate between surcharges and personal liability, presumably relying

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(applying this principle to a court-appointed receiver), that immunity neither extends to ultra vires acts, see Leonard v. Vrooman, 383 F.2d 556, 560 (9th Cir. 1967), nor protects the trustee against claims for breach of fiduciary duty, see Mosser, 341 U.S. at 271, 274. See generally E. Allan Tiller, Personal Liability of Trustees and Receivers in Bankruptcy, 53 Am. Bankr. L.J. 75 (1979).

on the Mosser Court's statement that "[t]he most effective sanction for good administration is personal liability for the consequences of forbidden acts." 341 U.S. at 274. Because only willful misconduct is "forbidden," the argument goes, negligence does not trigger personal liability.

This reasoning is tautological: whether or not negligent conduct is "forbidden" is the question, not part of the answer. More importantly, the reasoning depends on a misunderstanding of the word "surcharge," which is most fittingly defined as "[t]he imposition of personal liability on a fiduciary for wilful or negligent misconduct in the administration of his fiduciary duties." Black's Law Dictionary 1441 (6th ed. 1990). Given this definition, there is simply no principled way after Mosser to avoid the conclusion that a bankruptcy trustee can be personally liable for negligent breach of fiduciary duty. It follows inexorably that LeBlanc's pleading, taken in isolation, states a cause of action upon which relief can be granted.

B

Of course, we, like the lower courts, cannot take LeBlanc's complaint in isolation. The bankruptcy court appropriately took judicial notice of its own docket, see Fed. R. Evid. 201 (discussed supra note 2), and ruled that its order approving abandonment of the right to seek revocation of the Lizotte settlement shielded the trustee from personal liability for effecting the abandonment. The district court endorsed this ruling. We now turn to its merits, affording de novo review. See

Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990).

Once again, the starting point for our analysis is Mosser. In that case, the Court outlined a mechanism through which a bankruptcy trustee may avoid personal liability:

> The practice is well established by which trustees seek instructions from the court, given upon notice to creditors and interested parties, as to matters which involve difficult questions of judgment. . . . [If the challenged arrangement] was of advantage to the trust, this might have been fully disclosed to the court and the creditors cited to show cause why it should not have been openly authorized.

Mosser, 341 U.S. at 274. Following Mosser, this court has explained that a trustee acting with the explicit approval of a bankruptcy court is entitled to absolute immunity, as long as there has been full and frank disclosure to creditors and the court. See Lopez-Stubbe, 847 F.2d at 942 (citing Mosser, 341 U.S. at 274). This view has found near-universal favor elsewhere.[5] See, e.g., Yadkin Valley, 819 F.2d at 76; Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986);

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[5] Our canvass of the case law reveals only one suggestion to the contrary. See Quinn v. Fidelity & Deposit Co. (In re Sturm), 121 B.R. 443, 448 (Bankr. E.D. Pa. 1990) (dictum). Quinn concerned a general rather than specific approval order and relied solely on a pre-Mosser case as authority for its holding. See id. at 447-48. To the extent that Quinn is inconsistent with our holding today, we regard it as wrongly decided.

Boullion v. McClanahan, 639 F.2d 213, 214 (5th Cir. Unit A Mar. 1981) (per curiam). Only if a trustee prevaricates or otherwise acts in bad faith does he doff the cloak of derived judicial immunity. See Kowalski-Schmidt, 212 B.R. at 624.

We believe that derived judicial immunity in this context is essential to the orderly administration of bankruptcy proceedings. Allowing suits against trustees for executing explicit court orders would run an unacceptably high risk of turning trustees into "lightning rod[s] for harassing litigation aimed at judicial orders" and would create counterproductive tension between bankruptcy judges and trustees. Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1, 3 (1st Cir. 1976); see also Valdez v. City of Denver, 878 F.2d 1285, 1289 (10th Cir. 1989) (warning that, without immunity, "[o]fficials employed to implement facially valid court orders could choose: They may disregard the judge's orders and face discharge, or worse yet criminal contempt, or they may fulfill their duty and risk being haled into court").

The case at hand provides a vivid illustration. The merits of the Lizotte settlement have been debated in the Mailman bankruptcy case for years. Recognizing the contentiousness of the issue, Salem wisely sought judicial approval before relinquishing his right to move for revocation of the settlement. After a hearing at which all interested parties (including LeBlanc) were allowed to participate, the bankruptcy court expressly approved Salem's recommendation. Salem is thus entitled to immunity unless there is reason to be-

lieve that he acted in bad faith or that the notice of disclosure he provided was deficient.

The record reveals nothing of this sort. No one questions Salem's good faith. As to disclosure, Salem gave all parties in interest timely notice, and there is no basis for a suggestion that he was anything but forthcoming in his statements to the court and the creditors. Indeed, LeBlanc, for all his animadversions, makes no allegations to the contrary. Rather, he maintains that Salem ignored compelling evidence of fraud and failed to conduct an adequate investigation.

We do not gainsay LeBlanc's success in casting a cloud of suspicion over the real estate transaction. But a trustee's obligation to disclose requires only an honest and relatively complete accounting of what he knows, not an account that is letter perfect or born of omniscience.[6] After all, disgruntled parties always will be able, ex post, to dig up information that was not available to the court. To prevent a bankruptcy case from becoming Jarndyce and Jarndyce, see Charles Dickens, Bleak House (1853), the trustee at some point must decide that the costs of gathering more information outweigh the potential benefits. As long as he makes that decision in good faith

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[6] To be sure, we stated in Lopez-Stubbe that judicial approval is meaningful only after "the court is aware of all pertinent facts." 847 F.2d at 942. But this seemingly categorical statement must be read in context; because that case dealt with intentional misconduct by the trustee, see id. at 937 n.5, candid disclosure would have revealed all the pertinent facts.

and reveals the substance of what he knows, no more is exigible.

In this instance, Salem reached such a conclusion and acted upon it. In turn, the bankruptcy court was satisfied that it had enough information before it to approve abandonment. If a mistake has been made, LeBlanc's exclusive remedy is via direct appeal of the court order approving the abandonment. See supra note 1.

IV. CONCLUSION

We need go no further. Although the bankruptcy court properly exercised jurisdiction over this adversary proceeding and the complaint stated a facially valid cause of action, the trustee's derived judicial immunity warranted the entry of summary judgment in his favor.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 99-1170

IN RE: MAILMAN STEAM CARPET CLEANING
Debtor

GARY R. LEBLANC,
Appellant

v.

RICHARD P. SALEM,
Appellee

BEFORE:
SELYA, CIRCUIT JUDGE
BOWNES, SENIOR CIRCUIT JUDGE
and LIPEZ, CIRCUIT JUDGE

ORDER OF COURT

Entered: November 22, 1999

Appellant's petition for rehearing is denied.

By the Court:

Phoebe Morse, Clerk

/s/Janice M. O'Neil
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 99-40083-EFH

IN RE: MAILMAN STEAM CARPET CLEANING,
Debtor

MEMORANDUM AND ORDER

June 25, 1999

HARRINGTON, D.J.

This matter is before the Court on appeal from the United States Bankruptcy Court. The Appellant Attorney Gary LeBlanc, here representing himself, represented Mailman Steam Carpet Cleaning, Inc., In a lawsuit against Alfred Lizotte In which Mailman obtained a judgment against Lizotte In excess of $400,000, secured by a real estate attachment of certain commercial property owned by Lizotte. Later, Mailman went into bankruptcy; the sole significant asset in the bankruptcy estate was the judgment against Lizotte.

Based on an appraisal valuing the land securing the judgment at approximately $200,000 and perceived problems In the collectability of the judgment, the Trustee In the bankruptcy proceeding, Appellee Richard Salem, recommended that the claim against Lizotte be settled for $100,000.

The Bankruptcy Court allowed the settlement, over Appellant LeBlanc's objections, but provided that, if the property was sold within two years, the Trustee could move to revoke the settlement. At the hearing on LeBlanc's motion to revoke, the Bankruptcy Court clarified that it would allow a revocation if there was evidence that established that "the settlement agreement had been negotiated by Mr. Lizotte fraudulently; that is, Mr. Lizotte did not disclose...that he had a buyer willing to purchase the real estate...for significantly more than the $100,000 settlement."

When, In six months, a third party paid $560,000 for the property, the business assets of the gas station on the property, and a covenant by Lizotte not to compete, LeBlanc alleged fraud on the part of Lizotte and requested that the Court revoke the settlement. The Bankruptcy Court held a hearing on the motion but, finding insufficient evidence to sustain LeBlanc's allegations, refused, in its discretion, to revoke the settlement and instead allowed the Trustee's motion to \abandon the claim. LeBlanc has appealed that decision and, accordingly, the first issue before this Court is whether the Bankruptcy Court's refusal to revoke the settlement, In light of LeBlanc's allegations of fraud, constituted an abuse of discretion.

The second issue before this Court concerns the Bankruptcy Court's award of attorney's fees to LeBlanc. In the underlying suit against Lizotte, LeBlanc and Mailman had a one-third contingency fee agreement. When LeBlanc later agreed to defend the judgment on appeal, LeBlanc

and Mailman executed a subsequent contingency fee agreement, providing that LeBlanc would be entitled to the greater of 43 percent of the amount ultimately collected or compensation based on his hourly rate. The Bankruptcy Court struck down this subsequent agreement as violative of then-applicable Rule 3:05(5) of the Supreme Judicial Court. The Court allowed LeBlanc, however, a claim for attorney's fees In the amount of one-third the amount ultimately collected, pursuant to the original agreement between the parties, plus some expenses. LeBlanc appealed this decision as well and, accordingly, the second issue before this Court is whether the Bankruptcy Court award of attorney's fees to LeBlanc constituted an abuse of discretion.

After hearing oral argument and reviewing the record before it, including the Bankruptcy Court's decisions with respect to each of these two issues, the Court finds no abuse of discretion by the Bankruptcy Court with respect to either matter.

With respect to the first issue, the record simply does not reflect that the *land* owned by Lizotte and secured by the real estate attachment was valued at more than the $200,000 estimated by the independent real estate appraiser. LeBlanc did not introduce any expert testimony regarding the real estate's valuation either at the original proceeding before the Bankruptcy Court nor later after remand to it from this Court. Moreover, there is no evidence that Lizotte manipulated the valuation of his real estate nor any evidence that he had any potential buyer at the

time he entered into his settlement with Mailman's Estate. Accordingly, this Court cannot say that the Bankruptcy Court's refusal to revoke that settlement constituted an abuse of discretion.

Similarly, with respect to the second issue, the Court holds that the Bankruptcy Court did not err in refusing to enforce the subsequent contingency fee agreement. Moreover, the Court finds that the attorney's fees and expenses awarded by the Bankruptcy Court, amounting to $44,950.61 of the $147,000 ultimately collected for Mailman, are reasonable and do not constitute an abuse of discretion by the Bankruptcy Court.

Accordingly, this appeal is dismissed.

SO ORDERED.

/s/EDWARD F. HARRINGTON
United States District Judge

Supreme Court, U.S.
FILED
MAY 22 2000
CLERK

(2)

No. 99-1689

In The

Supreme Court of the United States

GARY R. LEBLANC,

Petitioner,

v.

RICHARD P. SALEM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1 pp

QUESTION PRESENTED

Whether there exists a conflict in federal law in a case clearly controlled by this Court's holding in *Mosser v. Darrow*, 341 U.S. 267 (1951), that a bankruptcy trustee, acting with the explicit approval of the bankruptcy court, is immune from suit in the absence of evidence of bad faith?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, bankruptcy trustee Richard P. Salem, requests this Honorable Court to deny the Petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the First Circuit. Petitioner's arguments were thoroughly considered and rejected by the First Circuit and do not warrant further review by the Court. Petitioner fails to articulate any legitimate reason for the issuance of a writ of certiorari. In addition to its misinterpretation of applicable law, the Petition contains numerous misstatements of the factual record and unsupported averments which go well beyond zealous advocacy. In accordance with Supreme Court Rule 15.2, Respondent is compelled to address the many errors and mischaracterizations contained in the Petition.

STATEMENT OF THE CASE

Respondent Richard P. Salem ("Salem") is the duly-appointed Chapter 7 trustee of the Estate of Mailman Steam Carpet Cleaning Corp. Petitioner Gary R. LeBlanc ("LeBlanc") is a creditor of the Estate. LeBlanc brought an adversary proceeding in the bankruptcy court alleging that Salem was negligent and had breached his fiduciary duty as trustee in abandoning an asset of the Estate. The abandonment was ordered by the bankruptcy court after notice and a hearing at which all interested parties (including Petitioner) were allowed to participate.

The bankruptcy court dismissed the adversary proceeding, holding that Respondent could not be held

personally liable because he had acted pursuant to a court order and therefore, his actions were entitled to protection under the doctrine of derived judicial immunity. Dismissal of the adversary proceeding was affirmed, on essentially the same grounds, by the Massachusetts federal district court and by the First Circuit Court of Appeal. The Petition to this Court is no more or less than a re-hash of arguments previously made by Petitioner and rejected below. The Petitioner has failed to articulate any legitimate reason for the issuance of a writ of certiorari. The Petition should be denied.

MISSTATEMENTS CONTAINED IN THE PETITION

At each level of appeal, the Petitioner, a pro se attorney, has exaggerated the evidence of record and mischaracterized the nature of the underlying proceedings. The Petition is replete with factual misstatements, unsupported averments and incorrect statements of the law. Pursuant to Supreme Court Rule 15.2, Respondent will address and correct *seriatim* the numerous misstatements contained in the Petition.

MISSTATEMENT #1

"Said Bankruptcy Court Order was a contingent settlement which required the Trustee Salem to review the 'facts of the sale' of commercial property, attached by a judgment awarded to the Mailman Estate, and after review, the trustee 'may move for revocation of the settlement.' "

(Petition for a Writ of Certiorari (hereinafter, "Petition") at p. 2)

CORRECTION

Petitioner is apparently referring to an order of the bankruptcy court issued on the Trustee's Motion to Approve Settlement of the Estate's claim against Alfred Lizotte. The Order, dated October 19, 1995, and misquoted by Petitioner, was entered after oral hearing (over Petitioner's objection). The actual Order provided, in full, as follows:

> "Settlement approved. The approval is conditional. If the gas station is sold within two years from today, the Trustee may move for revocation of this approval. Depending on the facts of the sale, the Court will then either confirm or revoke its approval."[1]

Petitioner's statements that the Order "required" the Respondent to review the facts of the sale is patently untrue.[2] To the contrary, the bankruptcy court *approved* the settlement, although the order *permitted* the Respondent to later challenge the settlement, *if* the Respondent deemed it appropriate.

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[1] The "asset" which Respondent abandoned (allegedly improperly) is derived from this court order: it is the right – but not the obligation – to move for revocation of the Court's approval of the settlement with Lizotte.

[2] Petitioner's "Question Presented" suffers from this same infirmity, i.e., that the bankruptcy court *ordered* the Respondent to investigate the Petitioner's allegations of fraud.

MISSTATEMENT #2

" . . . LeBlanc pleaded and demanded that Trustee Salem review the 'facts of the sale' and provide a complete accounting of the sale assets as required by the court order and trustee's fiduciary duty."

(Petition at p. 2)

CORRECTION

There is no evidence that Petitioner "pleaded and demanded" the Respondent to do anything. While such allegations, even if true, would have no legal effect on the merits of this claim, Petitioner has, once again, improperly inserted into the record an unsupported reconstruction of actual events. Moreover, as discussed *supra*, the bankruptcy court's order did *not* require the Respondent to provide an accounting of the sale assets, or to investigate the Petitioner's allegations of fraud.

MISSTATEMENT #3

"It is undisputed that despite LeBlanc's allegations of fraud, Trustee Salem failed and/or refused to provide an accounting or even investigate the sale."

(Petition at p. 3)

CORRECTION

As the Petitioner is well aware, the pleadings filed in the bankruptcy court and the transcripts of the numerous hearings held over the course of 2½ years (included in the Record Appendix submitted by Petitioner to the First Circuit) belie Petitioner's statement that Respondent "failed and/or refused to provide an accounting or even

investigate the sale." The evidence of record establishes that: (i) prior to moving the bankruptcy court for an order approving the settlement with Lizotte, Respondent reviewed the proposed settlement, determined it was fair and reasonable, noticed interested parties and creditors of his findings, and then presented his conclusions to the bankruptcy court at a duly-noticed hearing, attended by Petitioner; (ii) at a subsequent hearing, Respondent informed the bankruptcy court that he had no knowledge of facts with which to challenge the settlement; (iii) at Petitioner's request, the bankruptcy court permitted Petitioner to conduct discovery for the purpose of substantiating the allegations of fraud against Lizotte; (iv) after two years, when no evidence of fraud was forthcoming, Respondent sought to bring the settlement with Lizotte to conclusion; and (v) after a duly-noticed hearing, at which the Petitioner appeared in opposition, the bankruptcy court issued an order approving Respondent's request that the right to seek revocation of the settlement with Lizotte be abandoned.

MISSTATEMENT #4

"Creditor LeBlanc further demanded that Trustee Salem move to escrow the funds upon the sale of the subject property. . . . Again, it is undisputed that Trustee Salem failed and/or refused to do so. Within weeks of the sale of the subject property, the proceeds of the sale were distributed."

(Petition at p. 3)

CORRECTION

Petitioner's statement is directly contrary to the evidence of record. In fact, the Respondent did move the bankruptcy court for an order that the proceeds of the sale be placed in escrow, but the request was denied by the court.

MISSTATEMENT #5

"In March, 1998, over two (2) years subsequent to the sale of the subject property, Trustee Salem moved the Court to abandon the contingent claim and accept a reduced compromise settlement."

(Petition at p. 3)

CORRECTION

Whether by design or carelessness, the Petition misrepresents and misstates the nature of the relief requested in the bankruptcy court in several important respects.

First, the motion filed by Respondent in March 1998 sought approval to abandon the right to seek revocation of the Lizotte settlement. The purpose of the motion was to conclude the settlement which had been approved 2½ years earlier. Second, Petitioner neglects disclosing that the bankruptcy court allowed his request to conduct discovery to substantiate his claim of fraud against Lizotte and that Petitioner was unable to uncover any such evidence. Third, Respondent served notice of the motion for abandonment on all creditors of the Estate, including Petitioner; and the Petitioner had an opportunity to, and did, oppose abandonment at a bankruptcy court hearing. Fourth, Petitioner's statement that the Respondent

moved the court to "accept a reduced compromise settlement" with Lizotte is a blatant mischaracterization of actual events: in fact, the Respondent moved to abandon the right to seek revocation of the settlement on terms *previously approved* by the bankruptcy court.

MISSTATEMENT #6

"The Court, without a full hearing into the 'facts of the sale' or creditor's allegations of fraud, relied on Trustee, in his fiduciary capacity and allowed Trustee's motions, compromised the settlement and abandoned the claim."

(Petition at p. 3)

CORRECTION

As indicated *supra*, the bankruptcy court approved abandonment of the right to seek revocation of the settlement with Lizotte after several years of fruitless efforts by Petitioner to substantiate his claim that Lizotte had committed a fraud on the court. Likewise, the Respondent never obtained sufficient evidence of fraud to challenge the previously approved settlement. All of this information was presented to, and considered by the Court during a hearing held on April 15, 1998, at which the Petitioner argued against abandonment. At the conclusion of the hearing, the bankruptcy court approved the Respondent's motion for abandonment over the Petitioner's objection.

MISSTATEMENT #7

"Trustee Salem's failure in 1996 to investigate Creditor LeBlanc's allegations of real estate fraud in light of the court's order to review 'the facts of the sale,' and further

failure to provide even a basic accounting of the assets allegedly sold was willful intentional negligence." [sic]

(Petition at p. 4)

CORRECTION

As set forth *supra*, the Respondent was never ordered by the bankruptcy court to "review the facts of the sale." However, based upon the investigation which he did conduct, the Respondent found insufficient evidence of fraud to seek revocation of the Lizotte settlement. Despite Petitioner's attempt to recast the allegations of the adversary complaint at this late stage, at most, Petitioner's claim against the Respondent is for gross negligence. *See In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 6 n.3 (1st Cir. 1999). As the First Circuit found however, the conclusory allegation of "willful and deliberate" misconduct has no evidentiary support. *Id.*

MISSTATEMENT #8

"Although it is true that Creditor LeBlanc stopped short of accusing Trustee Salem of being a knowing participant in the fraud, it was only because LeBlanc feared further reprisals by the trustee . . . [T]he Complaint itself is a resounding allegation of bad faith by Trustee Salem."

(Petition at p. 5-6)

CORRECTION

Petitioner's attempt to raise the specter of fraud – a claim which was never asserted in the adversary complaint and which, as the First Circuit found, is entirely unsubstantiated – is a blatant attempt to recast the claims

actually asserted below and forms no part of the record on appeal. As Petitioner admits, Petitioner has never alleged that Respondent participated in a fraud; and Petitioner's implication that a fraud claim could have been asserted is empty rhetoric. Likewise, Petitioner's reasoning for why certain claims were or were not asserted has no relevance or evidentiary support, and ought not be considered by the Court.

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 provides that a writ of certiorari "will be granted only for compelling reasons." Petitioner has failed to offer any special or important reasons for this Honorable Court to review the well-reasoned decision of the First Circuit. The disposition below is in full accord with controlling law of this Court. Petitioner's challenge consists largely of disputed factual findings. There is no compelling reason for the grant of certiorari.

I. The Decision of the First Circuit Is Consistent with the Law of this Court and with Precedent of the Circuit Courts of Appeal

The premise of Petitioner's challenge is that Respondent should not obtain derived judicial immunity from the claim of breach of fiduciary duty in allegedly failing to ascertain that Lizotte had committed a fraud on the bankruptcy court. The evidence of fraud was so clear, Petitioner asserts, that Respondent's refusal to request the bankruptcy court to revoke its prior approval of the

settlement constitutes negligence (or gross negligence) for which Respondent should be held liable. However, this is the same (largely factual) argument which was presented below and rejected at each level of review. It need not be revisited by this Court.

The seminal decision on the issue of a trustee's fiduciary duties to creditors of a bankruptcy estate is *Mosser v. Darrow*, 341 U.S. 267, 71 S. Ct. 680, 95 L. Ed. 927 (1951). In *Mosser*, the Supreme Court held that a bankruptcy trustee may avoid personal liability by seeking instructions from the court upon difficult questions of judgment, and by providing notice of the requested action to creditors and other interested parties. *Id.*, 341 U.S. at 274. Following *Mosser*, every circuit court of appeal which has addressed the issue has held that, as long as there is full and frank disclosure to all interested parties, "a trustee acting with the explicit approval of a bankruptcy court is entitled to absolute immunity." *In re Mailman, supra*, 196 F.3d at 8.

In this case, as found by the First Circuit, Respondent "wisely" sought court approval to abandon the right to move for revocation of the Lizotte settlement and provided notice to all interested parties. After a hearing in which Petitioner presented his objections, the Court approved the abandonment. In the absence of bad faith – of which there is no evidence (nor even an allegation) – Respondent is entitled to "the cloak of derived judicial immunity" from Petitioner's claims. *Id.*

The First Circuit's decision is in full accord with *Mosser* and with all of the circuit courts of appeal which have addressed the issue. *See Yadkin Valley Bank & Trust*

Co. v. McGee, 819 F.2d 74 (4th Cir. 1987); *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096 (9th Cir. 1986); *Boullion v. McClanahan*, 639 F.2d 213 (5th Cir. 1981). Because there is no conflict in the application of federal law, the Petition should be denied.

II. This Case Does Not Present an Important but Undecided Question of Federal Law

In the Court's discretion, certiorari may be granted when the Petition presents an important question of federal law which has not been, but should be settled by this Court, or, when the circuit court of appeal has decided an important federal question in a way which conflicts with the law of this Court. Sup. Ct. R. 10(c). Notably, the Petition fails to identify any undecided, or conflicting question of federal law – precisely because none exists in this case.

Examples of important, undecided federal questions accepted for review by the Supreme Court include matters of constitutional law, *see e.g., Dickerson v. U.S.*, 120 S. Ct. 578 (Mem.), 145 L. Ed. 2d 481, 68 USLW 3361, *cert. granted* (U.S. December 6, 1999) (petition for certiorari granted to review whether Miranda warning is constitutionally based); or, the accommodation of state and federal interests under the Constitution, *see e.g., Kosydar v. National Cash Register Co.*, 417 U.S. 62, 94 S. Ct. 2108, 40 L. Ed. 2d 660 (1974); or, the interpretation of federal treaty obligations, *see e.g., Kolovrat v. Oregon*, 366 U.S. 187, 81 S. Ct. 922, 6 L. Ed. 2d 218 (1961).

The decision by the First Circuit here, that a bankruptcy trustee acting with the explicit approval of the

bankruptcy court, is immune from suit in the absence of evidence of bad faith, presents neither an important nor an undecided question of federal law. As set forth above, the First Circuit decision is in accord with the rule of *Mosser* and with all of the circuit courts of appeal. While the outcome of this case is significant to the litigants herein, no constitutional or federal question of wider import is presented by the Petition.

III. This Is Not the Rare Case in which the Court Should Consider Review of Allegedly Erroneous Factual Findings or the Alleged Misapplication of a Properly Stated Rule of Law

In "rare" instances, the Court may grant a petition for certiorari in order to correct erroneous factual findings or the misapplication of a properly stated rule of law. *See* Sup. Ct. R. 10(c). This case does *not* present the rare circumstance which merits such review and Petitioner has failed to articulate any rationale for the Court to intervene to "correct" the First Circuit's decision.

In reaching its conclusion that the Respondent was entitled to derived judicial immunity, the First Circuit undertook a *de novo* review of the merits of the claim. 196 F.3d at 8. As set forth in Section I above, the First Circuit correctly held that the Respondent followed the course dictated by *Mosser* and therefore was immune from Petitioner's claims. Even assuming the First Circuit misapplied well-settled legal principles to the facts, such an error would not warrant review by this Court.

The factual findings and legal conclusions in this case have been carefully considered by the bankruptcy court, the Massachusetts federal district court and the First Circuit Court of Appeals. At each level of review, the courts below reached a consistent result: that the Respondent is immune from the Petitioner's claims. There are no compelling reasons for this Honorable Court to undertake further review.

CONCLUSION

For the reasons set forth above, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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